No. 80-768

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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

AMUSEMENT AND MUSIC OPERATORS ASSOCIATION, ET AL., PETITIONERS

v.

COPYRIGHT ROYALTY TRIBUNAL, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether regulations promulgated by the Copyright Royalty Tribunal, requiring jukebox operators to disclose the number and locations of their jukeboxes, are reviewable only in the courts of appeals.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-11a) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 1980. A petition for rehearing was denied on September 9, 1980 (Pet. App. 12a-15a), and a motion for further reconsideration of that petition was denied on October 22, 1980 (Pet. App. 16a-17a). The petition for a writ of certiorari was filed on November 12, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In Section 801 of the Copyright Act of 1976, 17 U.S.C. (Supp. III) 801, Congress established the Copyright Royalty Tribunal as an independent agency in the legislative branch of government. The Tribunal adjusts copyright royalty rates to be paid by those utilizing copyrighted material, 17 U.S.C. (Supp. III) 801(b), and adjudicates the competing claims of copyright owners for the royalties collected. 17 U.S.C. (Supp. III) 116(c), 801(b)(3), 804(c).

The Copyright Act of 1976 abolished the exemption previously granted to jukebox operators by the Copyright Act of 1909 (17 U.S.C. 1(e)). The new Act requires jukebox operators to register their jukeboxes with the Copyright Office and to pay to the Register of Copyrights an annual royalty fee of $8.00 per jukebox. 17 U.S.C. (Supp. III) 116(b)(1). During January of each year copyright owners as-

serting an entitlement to royalty fees must file with the Tribunal a claim for these royalties based upon performances of the copyrighted works during the preceding twelve-month period. 17 U.S.C. (Supp. III) 116(c)(2). The Tribunal thereafter distributes the royalties collected among those copyright owners who have filed claims. 17 U.S.C. (Supp. III) 116 (c)(3), (4).

In enacting the jukebox royalty provision, Congress mandated that the Tribunal promulgate regulations that, without expense to or harassment of operators, grant potential royalty claimants access to jukebox locations, so that they may obtain statistical or other information with respect to the proportion of contribution by the claimant's musical works to the earnings of the jukebox. 17 U.S.C. (Supp. III) 116(c)(5).[1] Accordingly, the Tribunal published a notice of proposed rulemaking concerning access to jukeboxes (42 Fed. Reg. 62019 (1977)), published proposed rules (43 Fed. Reg. 20513-20514 (1978)), held a public hearing on June 21, 1978, in which petitioners participated, and adopted final regulations on September 12, 1978, requiring jukebox operators to submit to the Tribunal a list of locations of their jukeboxes, including the number of machines at each location. 43 Fed. Reg. 40498-40501; 37 C.F.R. 303.1-303.3.[2]

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[1] The Tribunal is also authorized to issue regulations governing the requirements for filing a claim to the compulsory licensing fees collected. 17 U.S.C. (Supp. III) 116(c)(2). In addition, Congress required the Tribunal to adopt regulations governing its procedures and methods of operation. 17 U.S.C. (Supp. III) 803(a).

[2] The regulations provide that access to jukebox establishments may be had only for the purpose of obtaining informa-

2. On October 27, 1978, petitioners, an association whose membership consists of jukebox operators nationwide and some individual members of the association, filed this action in the United States District Court for the District of Columbia. Petitioners asserted that the new regulations violated the Copyright Act, the Federal Reports Act, 44 U.S.C. 3501 *et seq.*, and the Fifth Amendment, and that the Tribunal was unconstitutionally organized within the legislative branch. The district court granted the Tribunal's motion to dismiss for failure to state a cause of action and for summary judgment (Pet. App. 4a).

The court of appeals vacated the district court's order and remanded with directions to dismiss the complaint for lack of jurisdiction (Pet. App. 5a-11a).[3] The court determined that Section 116 of the

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tion concerning the performance of musical works by the jukeboxes and that the right of access may be exercised only during regular business hours and only in such a manner as not to cause significant interference with the normal function of the establishments. 37 C.F.R. 303.2.

On petitioners' motion for reconsideration, the Tribunal announced, as a matter of policy under the regulations, that the actual lists filed by jukebox operators would not be disclosed; that information linking the name of the operator with the location of the jukebox would not be disclosed; that potential claimants would be provided only with the number, not the location, of jukeboxes by state, or, if possible, by local governmental entities; and that the Tribunal would not provide potential claimants with a list of all locations, but (upon application by such claimants) would provide a selected list of locations deemed appropriate by the Tribunal, compiled from the information received from jukebox operators. 43 Fed. Reg. 53795 (1978).

[3] The jurisdictional issue was raised by the court of appeals sua sponte. In supplemental briefs filed prior to the argument below, both petitioners and the Tribunal maintained that the district court had jurisdiction over the action (Pet. App. 7a and n.2).

Copyright Act, under which the challenged regulations were promulgated, is incorporated by reference within Section 801(b),[4] and that pursuant to Section 810, jurisdiction to review final decisions in Section 801(b) proceedings is vested exclusively in the courts of appeals (Pet. App. 8a-10a). The court found that its construction was bolstered by the fact that Section 810 provides not for de novo review, which ordinarily would be appropriate in the district court, but rather for review "on the basis of the record before the Tribunal." The court observed that "[w]here review is to be on the *agency record*, the Court of Appeals is well suited to consider the challenge in the first instance" (Pet. App. 9a; emphasis in original; footnote omitted). Moreover, the court rejected the argument that the district court had general federal question jurisdiction over the action, pursuant to 28 U.S.C. 1331. The court reasoned that, where, as here, " 'there exists a special statutory review procedure, it is ordinarily supposed that Congress intended that procedure to be the exclusive means of obtaining judicial review in those cases to which it applies' " (Pet. App. 11a, quoting from *City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979)).[5]

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[4] Section 801(b) authorizes the Tribunal, *inter alia*, "to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116 * * *" and "to distribute royalty fees deposited with the Register of Copyrights under sections 111 and 116 * * *." 17 U.S.C. (Supp. III) 801(b)(1), (3).

[5] The court of appeals rejected the other asserted jurisdictional grounds as well. It found that Section 803 of the Copyright Act did not provide for review of the challenged regulations in the district court. The court concluded that Section 803 pertained only to regulations governing the Tribunal's "procedures and methods of operations," and that the regula-

ARGUMENT

1. The court below concluded that the Copyright Act provides for exclusive review of the challenged regulations by a petition for review directly in the courts of appeals. That decision does not affect the substantive rights of any party under the Copyright Act, and it involves only a narrow issue of statutory construction concerning the proper forum for judicial review of certain types of regulations promulgated by the Copyright Royalty Tribunal. Furthermore, the decision is unambiguous; from now on all parties seeking review within the District of Columbia Circuit will know that Tribunal regulations promulgated to implement Section 116(c)(5) of the Copyright Act are to be reviewed directly in the court of appeals. The question presented by the petition is thus not particularly significant, and, in the absence of a conflict in the circuits on the issue, further review by this Court is clearly unwarranted.

2. In any event, although the Tribunal urged a different result below (see note 3, *supra*), the construction placed on the statute by the court of appeals is clearly a permissible one.

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tions challenged in this case were promulgated pursuant to Section 116 and not Section 803 (Pet. App. 10a-11a). The court also noted that Section 803 does not mention judicial review; thus, although the section provides that the Tribunal shall "be subject to the provisions of the Administrative Procedure Act," it "nowhere specifies the court in which review is to occur" (Pet. App. 11a). Finally, the court concluded that neither the Declaratory Judgment Act nor the Administrative Procedure Act independently confers jurisdiction on the district court and that the present case was not an action in the nature of mandamus. See note 6, *infra*.

Section 810 of the Copyright Act, 17 U.S.C. (Supp. III) 810, provides for direct review in the courts of appeals of any final decision of the Tribunal in Section 801(b) proceedings "to make determinations concerning the adjustment of reasonable copyright royalty rates as provided in sections 115 and 116 * * *," and in proceedings "to distribute royalty fees deposited with the Register of Copyrights under sections 111 and 116 * * *." 17 U.S.C. (Supp. III) 801(b)(1), (3). The court of appeals decided that the direct review provisions of Section 810 applied to the Section 116(c)(5) regulation granting potential royalty claimants access to petitioners' jukeboxes. In reaching that result it was not unreasonable for the court to conclude that the Section 116(c)(5) regulations constituted a final decision intimately connected with a proceeding under Section 801(b) to "make determinations concerning the adjustment of reasonable copyright royalty rates" and to "distribute royalty fees." As the court of appeals noted (Pet. App. 9a-10a), its construction of the statute is supported by logic. Where, as here, the judicial review provision of a statute does not authorize de novo review of the agency's regulations, but rather only provides for review of the agency's record for arbitrariness and capriciousness, it is reasonable to conclude, absent evidence to the contrary in the legislative record, that Congress intended direct review to take place in the court of appeals.[6]

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[6] Similarly, the court of appeals' decision on petitioners' other jurisdictional claims is correct. The court of appeals correctly decided that neither the Administrative Procedure Act nor the Declaratory Judgment Act provides an independent basis for federal jurisdiction (Pet. App. 10a-11a). See *Califano* v. *Sanders*, 430 U.S. 99, 104-107 (1977) (APA); *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 339 U.S. 667,

Furthermore, once the court concluded that the review procedures of Section 810 applied in this case, it properly held that jurisdiction did not lie under 28 U.S.C. 1331 (Pet. App. 11a). Section 810 states that "[n]o court shall have jurisdiction to review a final decision of the Tribunal except as provided in this section." Where Congress "has enacted a specific statutory scheme for obtaining review * * * the statutory mode of review [must] be adhered to notwithstanding the absence of an express statutory command of exclusiveness." *Whitney National Bank* v. *Bank of New Orleans*, 379 U.S. 411, 422 (1965). See also *City of Rochester* v. *Bond*, 603 F.2d 927, 931 (D.C. Cir. 1979); *UMC Industries, Inc.* v. *Seaborg*, 439 F.2d 953, 955 (9th Cir. 1971); *United States* v. *Southern Railway Co.*, 364 F.2d 86, 91 (5th Cir. 1966), cert. denied, 386 U.S. 1031 (1967).[7] *A fortiori*, a special statutory scheme for review must be followed where, as here, Congress has explicitly directed that it is to be the exclusive method for obtaining judicial review. *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 336 (1958).[8]

671-672 (1950) (Declaratory Judgment Act). Because petitioners' action is not in the nature of mandamus, jurisdiction does not lie under 28 U.S.C. 1361 or 1651.

[7] In the Administrative Procedure Act, 5 U.S.C. 703, Congress has specified that the proper form of judicial review is "the special statutory review proceeding relevant to the subject matter in a court specified by statute," unless that remedy is inadequate. Petitioners have not shown that direct court of appeals review of the Tribunal's regulations would be inadequate.

[8] Contrary to petitioners' suggestion (Pet. 14-15), even assuming that the district court complaint could be treated as a petition for review, it was not timely filed. Pursuant to Section 810 any petition for review must be filed within 30 days

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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after the Tribunal's final decision appears in the Federal Register. The challenged regulation was published in the Federal Register on September 12, 1978. 43 Fed. Reg. 40498. The complaint was not filed until October 27, 1978, 45 days later, and even petitioners' motion for reconsideration filed before the Tribunal on October 18, 1978, was not filed until after the time for judicial review of the regulation under Section 810 had expired.

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